

2013 IL App (2d) 111116-U  
No. 2-11-1116  
Order filed December 16, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Kane County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 99-CF-191
	)	
JESSIE Z. SWIFT,	)	Honorable
	)	Edward C. Schreiber,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE HUTCHINSON delivered the judgment of the court.  
Presiding Justice Burke and Justice Jorgensen concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant was not denied the effective assistance of trial court counsel where counsel did not investigate a witness who would have corroborated the recanted testimony of one of the victims. Defendant was not denied the effective assistance of trial court counsel where counsel did not offer any mitigating witnesses at sentencing. Defendant was not denied the effective assistance of appellate counsel where appellate counsel did not raise the issue of prosecutorial misconduct. Thus, the trial court did not err when it dismissed defendant's postconviction petition at the second-stage.

¶ 2 Defendant, Jessie Z. Swift, appeals the trial court's dismissal of his second-stage petition.

On appeal, defendant contends that his case should be remanded for a evidentiary hearing regarding

his postconviction allegations because (1) he was denied his right to effective assistance of trial counsel and (2) he was denied the effective assistance of appellate court counsel. For the reasons that follow, we affirm.

¶ 3 This cause stems from an event that occurred around midnight on January 21, 1999. On this night, two people were shot at a Shell gas station in Aurora, Illinois. Calvin Pryor, Jr. was killed in the shooting. Kevin McClernon was also shot but survived. Defendant was tried as the shooter. Following a jury trial, defendant was convicted of two counts of first-degree murder (720 ILCS 5/91-(a)(1) (West 1998)), two counts of attempted first-degree murder (720 ILCS 5/8-4(a) (West 1998)), one count of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 1998)), and one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 1998)). On appeal, we affirmed a single conviction and sentence for first-degree murder and a single conviction and sentence for attempted first-degree murder and vacated defendant's remaining convictions. See *People v. Swift*, No. 2-01-0080 (2002) (unpublished order under Supreme Court Rule 23). Defendant subsequently filed a postconviction petition. On February 25, 2010, the State filed a motion to dismiss. On October 17, 2011 the trial court dismissed defendant's postconviction petition after second-stage proceedings. This appeal stems from the trial court's dismissal of defendant's second-stage petition.

¶ 4 On February 17, 1999, defendant was indicted on two counts of first-degree murder, two counts of attempted first-degree murder, one count of aggravated battery with a firearm, and one count of aggravated discharge of a firearm. Prior to the trial, the State sought to introduce defendant's videotaped interview with detective Brian Olsen. Defendant requested that the videotaped interview be suppressed. The videotape shows defendant in handcuffs. Olsen testified

that he purposely left defendant in handcuffs for more than two hours. On the videotape, defendant denied involvement in the shooting and requested counsel four times. Olsen continued to question defendant. Olsen admitted that he continued questioning defendant after he requested counsel because he would “leave it for the court to decide” whether defendant had properly invoked his right to counsel. The trial court ruled that the tape would be suppressed from the point where defendant first requested counsel.

¶ 5 On August 28, 2000, defendant’s jury trial commenced. Joshua Tooley testified that, on the night of January 21, 1999, he and two friends, Kevin McClernon and Justin Turner, went to a Shell gas station for gas. Tooley testified that he looked up and saw defendant. He testified that defendant walked past in close proximity to his vehicle. Tooley testified that, “I heard some screaming and looked back and saw Jessie running towards Calvin Pryor shooting.” Tooley testified that he heard approximately five shots and saw defendant shoot towards Pryor two or three times. Tooley testified that after the shots stopped for “a second,” he started to get up. He witnessed defendant three or four feet from him. Tooley then witnessed defendant shoot McClernon. Tooley testified that he had known defendant for six or seven years, went to school with him, lived a couple blocks from him, and had been on a junior high football team with him. Tooley identified defendant as the shooter. Justin Turner testified that, on the night of the incident, he, Tooley, and McClernon drove to a nearby gas station. Turner testified that the gas station was well lit; he stated, “it’s [sic] clear as day.” Turner testified that he noticed defendant standing approximately 15 feet from his vehicle. Turner testified that, just as he was about to step out of his car, he heard three gunshots and heard the victim screaming. He testified that he heard two more shots and then everything was quiet for a few seconds. Turner testified that he “saw a blur, ducked down again, and that’s when the bullet went

through my passenger's window and shot Kevin." Turner testified that he did not specifically see defendant shoot either victim, but identified defendant as being at the gas station at the time of the shooting. Turner testified that he had known defendant for approximately six years, went to school with him, and was on a junior high football team with him. Turner identified defendant to police.

¶ 6 The surviving victim, Kevin McClernon, testified at trial that he was at the Shell station on the night of the incident in Turner's car with Tooley when he noticed a man walking toward their vehicle. He testified that he told his friends, "[T]hat's Jessie Swift and [it] looks like he's strapping, which means looks like he's got a gun on him." McClernon testified that he heard gunshots, after defendant walked past and then he heard screaming. McClernon testified that the man walked around their vehicle and that he saw the man pointing something at him. McClernon was unable to recall whether he saw a gun or a flash. McClernon covered his head and was shot.

¶ 7 McClernon testified that his friends drove him to the hospital. He did not recall speaking with police officers while in the emergency room. He testified that he did not recall telling police officers that a black man shot him but that he was " 'light-headed' and 'out of it' at the time." McClernon later identified defendant as the person he saw at the Shell station on the night of the incident.

¶ 8 The parties stipulated that Officer Hinterlong of the Aurora police department would testify that he interviewed McClernon in the emergency room of the hospital and McClernon stated that a black man shot a person unknown to him at the gas pumps and then shot him through the passenger window as the man ran past him.

¶ 9 Lakecia Coleman testified that, on the night of the incident, she went to the Shell gas station with Jovan Daniels, Joshua Correa, and Mariel Rodriguez. She testified that she knew Calvin Pryor

and recognized his vehicle at the gas station. She exited the car and approached Pryor's car, where she witnessed Pryor lying on the ground. Coleman testified that she did not hear any shots or see anyone leave the scene. She testified that, other than the car she was in and Pryor's car, she did not witness any other car at or leaving the gas station.

¶ 10 Detective Brian Olson testified that he interviewed defendant the day after the shooting. He testified that defendant denied being involved in the incident. The State again sought to introduce the beginning portion of the videotaped interview. The State argued that the videotape was admissible to rebut testimony that defendant was not told he was involved in a murder investigation until the end of the interview. However, all parties were concerned with the possibility that the jury would "wonder about the tape." The trial court stated that the State was prohibited from mentioning the existence of the videotape during direct and cross examination and further stated,

"At the end of the cross, I will then reassess the situation. And if I conclude that justice requires that the tape come in, I think we'll have to send the jury home and work on editing the tape so that they may hear it tomorrow."

After further argument from the State, the trial court stated,

"My concern here is allowing into evidence that [which is] not appropriate rebuttal. The defendant admitted in his testimony as to what he told the detectives about the time. And if the tape is played, that brings it in again. But not as an appropriate rebuttal.

And what the State legitimately wants to rebut is the defendant's testimony about when he was told of the crime and that can be done, it seems to me, through the witness. And if the witness is cross-examined on how he knows about the time, he, of course, may make reference to the tape."

Defendant's trial counsel responded,

“Judge, if there's reference to the tape at some point, I would request some type of instruction to the jury [,] the reason why they're not hearing the tape. They're going to wonder about a tape. That [it] does not contain any information that's relevant or something at this particular point.”

The trial court replied, “I will address that issue if and when it becomes necessary.”

¶ 11 During its questioning, the State asked Olsen, “Now, you took a chance to review a tape of that interview, is that correct?” Olson answered affirmatively. The State then asked, “From your memory of the review of the tape, do you recall about how long that interview took defense counsel asked to approach the bench regarding the State's mention of the videotape and objected to the State's mention of it. The jury was removed and parties discussed how to instruct the jury regarding the State's mention of the tape. The parties agreed to the trial court's proposal to tell the jury, “[Y]ou have heard reference to a tape of the police interview of the defendant. Through testimony you have heard the relevant information that is on this tape. The tape itself will not be played because it contains irrelevant material in addition to what you have already heard.”

Defendant testified that he was not involved in the shooting and was at home during the time that the shooting occurred. Defendant's girlfriend, his cousin, his stepfather, and his brother also testified that defendant was at home when the incident occurred.

¶ 12 During the State's closing argument, counsel stated that defendant's “alibi witnesses put him at the scene of the crime at the time of the crime in the area of the offense.” Defendant was convicted of two counts of first-degree murder, two counts of attempted first-degree murder, one count of aggravated battery with a firearm, and one count of aggravated discharge of a firearm.

On November 6, 2000, the trial court held a sentencing hearing. Defendant's trial counsel did not present any witnesses or independent evidence in mitigation. Instead, counsel argued that imposing consecutive sentences would violate *Apprendi*. See *Apprendi v. New Jersey*, 530 U.S. 446 (2000) (holding that other than a prior conviction, any fact that increases the penalty beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt).

The trial court determined that *Apprendi* did not prohibit the trial court from imposing consecutive sentences in the current matter. The trial court found that consecutive sentences were required to protect the public from further criminal conduct by defendant pursuant to 730 ILCS 5/5-8-4(b) (West 1998). The trial court sentenced defendant to two concurrent 50-year sentences on the first-degree murder convictions to be served consecutive to a 15-year sentence on the attempted murder conviction and concurrent terms of 10 and 7 years' imprisonment on the convictions for aggravated battery with a firearm and aggravated discharge of a firearm, respectively.

¶ 13 On January 17, 2001, defendant filed his notice of appeal. Appellate counsel argued that (1) defendant's convictions and sentences for aggravated battery with a firearm and aggravated discharge of a firearm must be vacated where those convictions were predicated upon the same physical acts as the murder and attempted murder, and (2) defendant's 50-year sentence for the murder conviction was excessive. On August 13, 2002, we affirmed a single conviction and sentence for first-degree murder and a single conviction and sentence for attempted first-degree murder and vacated defendant's remaining convictions. See *People v. Swift*, No. 2-01-0080 (August 13, 2002) (unpublished order under Supreme Court Rule 23).

¶ 14 On March 4, 2003, defendant filed a *pro se* postconviction petition. Defendant argued that his trial counsel was ineffective because counsel did not investigate and interview witness Joshua

Correa, who defendant claimed would have testified that he saw a “tall black man” leaving the scene moments after the shooting at the Shell station. Defendant further argued that his trial counsel was ineffective because his trial counsel failed to call any character witnesses to testify in mitigation during his sentencing hearing. Defendant’s petition alleged that defendant offered trial counsel a list of character witnesses who could testify on his behalf, but on the day of the sentencing hearing, counsel admitted to defendant that he had misplaced the list and had, therefore, failed to subpoena defendant’s character witnesses. On July 1, 2003, the trial court advanced defendant’s petition to second-stage proceedings and appointed counsel to represent defendant.

¶ 15 On April 2, 2009, postconviction counsel filed an amended postconviction petition. In the amended petition, postconviction counsel expanded upon defendant’s *pro se* ineffective-assistance-of-counsel claim and argued that newly discovered evidence proved defendant’s actual innocence. Specifically, postconviction counsel argued that defendant received the ineffective assistance of counsel because (1) trial counsel failed to investigate or interview Correa, although Correa would testify that he saw a black man leaving the scene of incident and (2) trial counsel failed to call any character witnesses to testify in mitigation during defendant’s sentencing hearing. With regard to newly discovered evidence, postconviction counsel asserted that it had recently come to light that another man, Jovan Daniels, was riding in the vehicle with Correa on the night of the incident and witnessed a black man running from the scene with something shiny in his hand moments after the shooting. Postconviction counsel argued that the statements of Correa and Daniels, as was outlined in the affidavits attached to the amended petition, corroborated the initial statement of McClernon that he was shot by a black man and, taken as a whole, showed that defendant is actually innocent.

¶ 15 Last, postconviction counsel argued that defendant’s appellate counsel was ineffective for



failing to raise meritorious issues regarding the “admission of irrelevant, highly prejudicial evidence and prosecutorial misconduct.” Specifically, postconviction counsel asserted that the State’s actions of referencing the videotape at trial, “in direct violation of the trial court’s order,” prejudiced defendant. Postconviction counsel asserted that, although the trial court attempted to remedy the situation by instructing the jury regarding the videotape, prejudice remained because “the jury was left to speculate as to why they did not see the tape.” Moreover, postconviction counsel asserted that appellate counsel was ineffective for failing to raise the issue of prosecutorial misconduct during closing arguments. Specifically, postconviction counsel asserted that, during closing arguments, the State told the jury that defendant’s “alibi witnesses put him at the scene of the crime at the time of the crime in the area of the offense.” The trial court transcripts indicate that defendant’s alibi witnesses all testified that defendant was at his home when the incident occurred. Postconviction counsel asserted that this constituted “blatant prosecutorial misconduct” and was a meritorious issue that should have been raised on appeal.

¶ 16 On February 25, 2010, the State filed a motion to dismiss the petition arguing that defendant’s original *pro se* petition was untimely and without merit. The State asserted that defendant’s petition was due before March 3, 2003. The State further argued that that any evidence from Correa or Daniels was insignificant because it did not establish defendant’s actual innocence in that neither Correa nor Daniels witnessed the shooting. The State also argued that, because Daniels was listed as a potential witness on the State’s answer to discovery, any evidence he could introduce was not newly discovered. Regardless, the State argued Correa and Daniels were not credible witnesses due to their prior convictions. Last, the State argued that the ineffective assistance of appellate counsel claim failed on its merits.

Postconviction counsel replied to the State's motion to dismiss. Postconviction counsel argued that the *pro se* petition was timely and supported its argument by citing *People v. Mitchell* (296 Ill. App. 3d 930 (1998)), which involved the same statutes in the instant case and held that a postconviction petition filed six months and 35 days after an appellate court decision was timely.

¶ 17 On October 17, 2011, the trial court found that the petition was timely but granted the State's motion to dismiss on the merits. The trial court found that trial counsel's decision not to call Correa or Daniels to testify was not prejudicial because neither man witnessed the crime, both men failed to come forward in a timely fashion, and two other eyewitnesses identified defendant as the shooter. The trial court also found that the claim of ineffective assistance of trial counsel for failing to present witnesses in mitigation failed because defendant's petition did not identify the witnesses or the content of their proposed testimony. Additionally, the trial court found the allegation of ineffective assistance of appellate counsel was without merit because the claims of prosecutorial misconduct were not "so egregious as to call into question appellate counsel's competency" for failing to challenge them on appeal.

¶ 18 On November 2, 2011, defendant timely filed his notice of appeal. On November 16, 2011, defendant filed an amended notice of appeal.

- I. Defendant first contends that the case should be remanded for an evidentiary hearing on Defendant's postconviction allegation that he was deprived of his right to effective assistance of trial court counsel.

Defendant contends that the case should be remanded for an evidentiary hearing regarding his right to the effective assistance of trial counsel. Defendant first argues that trial court counsel failed to investigate and present witness testimony to corroborate McClernon's initial claim that an unknown black man shot him. The State counters that the trial court properly granted its motion to dismiss

because defendant's petition failed to demonstrate a substantial showing of a constitutional violation where the proposed witnesses would not have been able to testify regarding the shooting that would have been rebutted by State's witnesses. We agree with the State.

¶18 The Post-Conviction Hearing Act creates a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Harris*, 224 Ill. 2d 115, 125 (2007). At the first stage, the petition's allegations, liberally construed and taken as true, need to present only "the gist of a constitutional claim." *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). With regard to this requirement, a defendant at the first stage need only present a limited amount of detail (*People v. Ligon*, 239 Ill. 2d 94, 104 (2010) (citing *People v. Hodges*, 234 Ill. 2d 1, 9 (2009))), and the defendant need not make legal arguments or cite to legal authority (*Ligon*, 239 Ill. 2d at 104 (citing *Id.* at 418. At the second stage, an indigent defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. *Gaultney*, 174 Ill. 2d at 418. At the third stage, the trial court conducts an evidentiary hearing on the petition. *Gaultney*, 174 Ill. 2d at 418. A defendant is not entitled to an evidentiary hearing on her or his petition as a matter of right. *Id.* at 418. "Rather, a defendant is only entitled to an evidentiary hearing where the allegations contained in the petition, supported by the trial record and any accompanying affidavits, make a substantial showing of a constitutional violation." *Lucas*, 203 Ill. 2d at 418. We review *de novo* the dismissal of a postconviction petition at the second stage. *People v. Whitfield*, 217 Ill. 2d 177, 182-83 (2005) (citing *People v. Munson*, 206 Ill. 2d 104, 115 (2002)) .

¶19 To prevail on a claim of ineffective assistance of counsel, defendant must show that his attorney was incompetent by demonstrating that his performance fell below an objective standard of reasonableness and that defendant was prejudiced by the allegedly deficient performance by

demonstrating that it was reasonably probable that, but for counsel's actions, the result of the proceedings would have been different. *Strickland*, 446 U.S. at 694., *People v. Dominguez*, 331 Ill. App. 3d 1006, 1014 (2002). A reasonable probability is a probability sufficient of undermining confidence in the outcome, namely that counsel's deficient performance rendered the result of the trial unreliable or the proceedings fundamentally unfair. *People v. Enis*, 194 Ill. 2d 361, 376-77 (2000). Because defendant is entitled to competent, not perfect, representation, defendant must demonstrate that the alleged errors were so serious as to deprive him of a fair trial. *People v. Griffin*, 178 Ill. 2d 65, 91 (1997). Defendant must overcome the strong presumption that counsel's actions were the product of sound trial strategy. *People v. Gapski*, 283 Ill. App. 3d 937, 942 (1996).

¶ 20 In the present matter, defendant argues that his trial counsel was ineffective because he did not investigate nor present a witness, Correa, who would have corroborated McClernon's initial statement that he was shot by a black man. Initially, we note that this issue was not brought up on appeal and may, therefore, be considered forfeited. *People v. McKown*, 236 Ill. 2d 278, 310 (2010) (Failure to raise an issue on appeal results in forfeiture of that issue). However, because defendant contends that his appellate counsel was also ineffective, we analyze the issue. We determine that defendant's trial counsel was not ineffective. First, the record reflects that trial counsel's actions were trial strategy. *Gapski*, 283 Ill. App. 3d at 942. Defendant's *pro se* postconviction states that prior to trial, defendant asked trial counsel if he had subpoenaed Correa to testify on his behalf and that trial counsel responded that he did not feel Correa's testimony would be necessary to procure an acquittal. Although defendant claims that he continued in his attempts to persuade his trial counsel of the importance of Correa's testimony, trial counsel continued to disagree and ultimately chose not to call Correa at trial. These statements, taken directly from defendant's original *pro se*

postconviction petition, demonstrate that trial counsel's actions were purposeful trial strategy. See *Gapski*, 283 Ill. App. 3d at 942 (defendant must overcome the strong presumption that counsel's actions were the product of trial strategy).

¶ 21 Moreover, even if trial counsel had subpoenaed Correa to testify, it is not reasonably probable that Correa's testimony would have altered the results of the trial; therefore, defendant did not suffer the prejudice required by the second-prong of *Strickland*. See *Strickland*, 446 U.S. at 694. In the current matter, defendant, his girlfriend, brother, and stepfather testified that defendant was at home during the time of the incident. The parties stipulated that Officer Hinterlong would have testified that McClernon initially stated that he was shot by a black man. The surviving victim, and Turner testified that defendant was at the gas station during the incident. Tooley testified that he witnessed defendant shoot both victims. Coleman, who was in the same vehicle as Correa, testified that her car pulled up after the shooting and that she did not hear any shots or witness the shooting. Coleman also testified that she did not see any other cars or people at the gas station that evening. The jury, in this case, had the opportunity to hear multiple witnesses, some of whom claimed defendant was the shooter, some of whom claimed that defendant was at his home at the time of the incident, and some of whom claimed defendant was at the gas station at the time of the incident. The jury weighed the evidence and determined that it believed the testimony of the State's witnesses. It is not the business of this court to reevaluate the credibility of the testifying witnesses. See *People v. Herman*, 407 Ill. App. 3d 688,704 (2011) (finders of fact are in the best position to judge witness credibility and due consideration must be given that the fact finder saw and heard the witnesses). It is not reasonably probable that but for the testimony of a witness who corroborated the recanted statements of another testifying witness who was severely injured, hospitalized, and on prescription

pain medication at the time of his statement, the outcome of the trial would have been different. See *Strickland*, 446 U.S. at 694.

¶ 22 Furthermore, Correa was not a witness to the shooting. He arrived after the shooting had occurred. He could not testify that he witnessed a black man shoot anyone; only that he saw a black man leaving the area shortly after the crime occurred. Coleman, who was in the same vehicle as Correa, corroborated Correa's affidavit in that she also did not witness the shooting. Correa's testimony would not have contradicted the testimony of other witnesses who testified that defendant was the shooter. *People v. Collier*; 387 Ill. App. 3d 630, 637 (2008) (holding that evidence that merely contradicts another witnesses testimony will typically not be of such conclusive character as to justify postconviction relief). Thus, it is not reasonably probable that but for trial court counsel's decision not to call Correa, the results of the trial would have been different. See *Strickland*, 446 U.S. at 694.

¶ 23 Regarding newly discovered evidence that proves actual innocence, to establish a claim of actual innocence in a postconviction petition, defendant must establish that: (1) the evidence was not available at defendant's trial and could not have been established through due diligence; (2) the evidence must be material and non-cumulative; and (3) the evidence must be of such conclusive character that it would probably change the result at retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009).

¶ 24 Here, Correa was on the State's witness list. The evidence Correa could have offered was cumulative and not material. Correa's testimony corroborated only McClernon's initial statement to police, which was made while McClernon was "out of it," suffering from severe injuries, and on pain medication. Moreover, McClernon testified that he did not recall his initial statement to police

and recanted that statement at trial. Furthermore, Correa's testimony would only have contradicted the testimony of McClernon, Turner, and Tooley, but would not have exonerated defendant. See *Collier*; 387 Ill. App. 3d at 637 (holding that evidence that merely contradicts another witnesses testimony will typically not be of such conclusive character as to justify postconviction relief). We, therefore, determine that defendant's "newly discovered evidence" proving his "actual innocence" of the crime, was neither newly discovered nor exonerating.

¶ 25 We further note that defendant failed to bring either of these arguments up on direct appeal. Moreover, although defendant now alleges ineffective assistance of appellate counsel, he does not list appellate counsel's failure to offer either of these issues on appeal among appellate counsel's alleged deficiencies. See *McKown*, 236 Ill. 2d at 310 (Failure to raise an issue on appeal results in forfeiture of that issue).

¶ 26 Defendant next argues that his trial counsel was ineffective because he failed to offer mitigating witnesses during defendant's sentencing hearing. We disagree. Defendant asserts that, on the day of the sentencing hearing, he spoke with trial counsel, and trial counsel admitted that he had "misplaced" defendant's list of mitigating witnesses. Assuming that trial counsel's admission demonstrates that trial counsel was deficient and that his action did not constitute sound trial strategy, we still do not determine that trial counsel was ineffective because defendant failed to demonstrate that, but for trial counsel's actions, the results at trial would have been different. Here, defendant failed to attach affidavits from the proposed witnesses. This error was not remedied after two amended petitions by postconviction counsel. Pursuant to *Enis*, 194 Ill. 2d at 380, absent such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony favorable to defendant, and further review of the claim is unnecessary. Hence, we

determine that defendant failed to demonstrate that his second argument met the second-*Strickland* prong. Thus, we determine that defendant's second argument that his trial counsel was ineffective was without merit.

II. Defendant next contends he was denied the effective assistance of appellate counsel.

¶ 27 Defendant finally contends that his appellate counsel was ineffective for failing to argue prosecutorial misconduct on appeal. Defendant first argues that the State's mention of the videotape during trial testimony violated the trial court's order and constituted prosecutorial misconduct. Thus, according to defendant, appellate counsel's failure to raise this issue on appeal constituted ineffective assistance of counsel. The State counters that defendant misstates the facts and argues that the trial court never ordered the parties to refrain from mentioning the videotape. In the alternative, the State argues that the error was harmless and was cured by the agreed upon jury instruction at trial. We determine there was no error.

¶ 28 Defendant has a constitutional right to the effective assistance of counsel during the defendant's appeal as of right. *People v. Robinson*, 217 Ill. 2d 43, 47 (2005) (citing *People v. Flores*, 153 Ill. 2d 264, 277 (1992)). However, appellate counsel is not required to argue every conceivable issue on direct appeal. *People v. Williams*, 209 Ill. 2d 227, 243 (2004). Rather, counsel must exercise professional judgment to select from the many potential claims of error that might be asserted on appeal. *Williams*, 209 Ill. 2d at 243 (citing *People v. Tenner*, 175 Ill. 2d 372, 387-88 (1997)).

¶ 29 In the present matter, the State is correct; defendant misstates the facts. A review of the record indicates that the trial court never ordered the State to refrain from mentioning the videotape,



but instead decided to address the issue when and if the State mentioned the videotape while examining Olson. The State subsequently mentioned the videotape during Olson's examination. The parties then agreed that they would remedy the situation by the trial court instructing the jury,

“[Y]ou have heard reference to a tape of the police interview of the defendant. Through testimony you have heard the relevant information that is on this tape. The tape itself will not be played because it contains irrelevant material in addition to what you have already heard.”

¶ 30 Thus, because the record does not reflect that the State violated any court order and does reflect that all parties agreed on a curative remedy, no error occurred. See *People v. Simms*, 192 Ill. 2d 348, 396 (2000). Therefore, because there was no error, we cannot say that appellate counsel was ineffective for failing to raise this issue on appeal.

¶ 31 Defendant's second argument was that appellate counsel was ineffective for failing to raise the issue of the State's misstatements during closing argument. Specifically, defendant asserts that during closing arguments, the State told the jury, defendant's "alibi witnesses put him at the scene of the crime at the time of the crime in the area of the offense." The State argues that defendant has abandoned this argument. As defendant does not put forth any argument regarding this assertion in his briefs, we agree with the State and do not address the argument here.

¶ 32 In conclusion, because defendant did not receive ineffective assistance of either trial counsel or appellate counsel as alleged in his postconviction petition, the trial court properly found that defendant failed to make a substantial showing that his constitutional rights were violated. *Lucas*, 203 Ill. 2d at 418. Thus, the trial properly dismissed the petition.

¶ 33 For the forgoing reasons, we affirm the decision of the circuit court of Kane County.

¶ 34 Affirmed.